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Fair Warning: The Supreme Court May Restrain the FTC's Traditional Remedies

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Within weeks, the United States Supreme Court may significantly restrain the enforcement power of the Federal Trade Commission. For years, many FTC actions punished businesses for what the FTC considered to be unfair or deceptive commercial conduct through an expansive reading of its statutory right to seek "injunctive relief." Whether there was any warning through prior administrative action or regulations was irrelevant; the FTC used that provision to demand

"restorative monetary relief," which was a conventional money judgment. In doing so, the Commission disregarded fair warning obligations within the provisions of the FTC Act that expressly provided for such relief, such as Section 5's "other and further equitable relief" and Section 19's remedy for "the refund of money or return of property." The FTC chose the Section 13 "injunctive relief" route to a money judgment because it could move without warning that it considered the targeted activity unfair or deceptive. Extrapolating from earlier Supreme Court rulings on "injunctive relief," the courts of appeal routinely stamped an approval on the FTC's efforts. The process continued for almost fifty years until an appellate panel noticed a flaw in the FTC's interpretation. That decision, in *Federal Trade Commission v. Credit Bureau Center, LLC,* 937 F.3d 764 (7th Cir. 2019), ricocheted, and soon other courts began to take notice. Meanwhile, a panel of the Ninth Circuit Court of Appeals, reviewing a $1.3 billion judgment involving a short-term lending enterprise, rejected an argument that the Supreme Court's decision in *Kokesh v. SEC* , 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017), "severs the line of reasoning that links 'injunctions' to 'equitable monetary relief.'" However, in a remarkable Concurrence, the two circuit court judges on the panel wrote separately "to call attention to our circuit's unfortunate interpretation of the Federal Trade Commission Act." The Concurrence explained the illogic of the traditional deference to the FTC's remedies, and went on to reference emerging Supreme Court rulings to rejected previously broad readings favoring implied relief:

"Just last year, Justice Kennedy explained in *Ziglar v. Abbasi* that the Supreme Court once "followed a different approach to recognizing implied causes of action than it follows now." ––– U.S. ––––, 137 S.Ct. 1843, 1855, 198 L.Ed.2d 290 (2017). Under this "*ancien regime* ," the Court described, it was assumed "to be a proper judicial function to provide such remedies as [were] necessary to make effective a statute's purpose." *Id.* (internal quotation marks omitted). Since those days, however, the Court has "adopted a far more cautious course before finding implied causes of action." *Id.* at 1855.

While the Ninth Circuit Court of Appeals turned down that petition to reconsider its approach, the Supreme Court did not. Now, the issue appears to be on the cusp of correction. When it is, the Court may fortify fair warning concepts while restraining implied remedies and claims.

Notice is a bedrock feature of due process of law, yet its application can be illusory. Sometimes, government fails its essential obligation to provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States,* 283 U.S. 25, 27 (1931) (Justice Oliver Wendell Holmes). Elements of the Supreme Court oral argument on January 13, 2021 in *AMG Capital Management, LLC v. Federal Trade Commission,*

Docket No. 19-508, which confronted the Federal Trade Commission with this essential issue, are grounded in this principle.

The *AMG* case involves Section 13 of the Federal Trade Commission Act, which allows the FTC to seek an "injunction" against a business that "is violating, or is about to violate, any provision of law enforced by [the FTC]." The FTC has frequently enforced its power under Section 5 of the Federal Trade Commission Act to prevent "unfair or deceptive acts ... affecting commerce" through Section 13. In doing so, it often seeks what it characterizes as "restorative monetary relief" on the theory that the statutory authority to obtain an "injunction" implicitly includes all traditional forms of equitable relief. Sometimes, the resultant judgments have been eye popping, such as the 1.3 billion dollar award in *AMG*, which the FTC had trumpeted as its biggest win ever. *See* https://www.ftc.gov/news-events/blogs/business-blog/2016/10/record-13-billion-ruling-against-scott-tucker-others-behind. Whether the FTC could properly use that authority to sue for monetary relief as part of an injunction or seek such damages only *after* prior pronouncements on the activity turned on the structure of its statute. This, in turn, triggered the basic issue that Justice Holmes had so eloquently identified ninety years ago.

The panel of the Seventh Circuit Court of Appeals that considered the FTC's statutory construct summarized its enforcement arms as follows:

The FTCA gives the Commission several tools to enforce the Act's prohibition on unfair or deceptive trade practices. Under its "cease and desist" power, the Commission adjudicates a case before an administrative law judge, who can issue an order prohibiting the respondent from engaging in the illegal conduct at issue. ... A final cease-and-desist order empowers the Commission to sue the violator for legal and equitable relief, but only if "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent." After it becomes final, the order also draws a line in the sand for both the respondent and anyone else who engages in the prohibited conduct. If the respondent later violates the order, the Commission can sue for civil penalties and any equitable relief "the court finds necessary." If anyone else engages in the prohibited conduct after the order becomes final, the Commission can seek civil penalties if it can prove that the violator acted with "actual knowledge" that his conduct was unlawful.

The Commission has two other enforcement mechanisms at its disposal. First, it can promulgate rules that "define with specificity acts or practices which are unfair or deceptive." By preemptively resolving whether certain conduct violates the FTCA, rulemaking permits the Commission to pursue "quick enforcement" actions against violators. Once the Commission promulgates a rule, it

can seek legal and equitable remedies, including restitution, from violators. And if it establishes that a violator had "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that his conduct violated a rule, the Commission can also pursue civil penalties.

The Commission's remaining enforcement mechanism is different. Under section 13(b) of the FTCA, the Commission can forego any administrative adjudication or rulemaking and directly pursue a temporary restraining order and a preliminary or permanent injunction in federal court.

It is this final enforcement mechanism, i.e., for injunctive relief, that the FTC has used so frequently and effectively to obtain monetary and other relief. For decades, its right has been unquestioned, while its power has been unrestrained.

The telephonic argument in *AMG* proceeded under the current pandemic format with each justice taking a turn based on seniority (following the Chief Justice, John Roberts, which position is considered the most senior). The specific question presented was "Whether Section 13(b) of the Federal Trade Commission Act, by authorizing "injunction[s]," also authorizes the Federal Trade Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief." The FTC's position was quickly undermined; it collapsed when it became Justice Stephen Breyer's turn.

Justice Breyer first pointed to the historic "compromise" within the FTC Act, which contemplated a bright line of misconduct:

History matters. I think Justice Brandeis, when he started [working on the FTC Act], was faced with a business community that was very suspicious of the FTC's power and thought it would be abused and a progressive community that thought it's absolutely necessary to bring bad business practices under control. So they compromised. The compromise was you've got to do what the FTC says, but before it tells you to do something, it will find that what you're doing now is wrong. It will find that. It will be a cease-and-desist order.

He then explained that other sections of the FTC Act, i.e., Sections 5 and 19, contemplated a "cease-and-desist order or violation of a rule" as a predicate to an award of damages. However, the FTC usually chooses to bypass those sections as being too burdensome. Instead, the FTC seeks damages through a lawsuit under Section 13, which permits injunctive relief for certain activity. In so doing, the FTC may simply claim without warning that it views an activity - which it had not previously proscribed or regulated - to be deceptive in the first instance and seeks money damages awards as a form of "injunctive relief."

Justice Breyer forcefully exposed the insidious nature of this approach: "'Do not worry,' says the FTC, 'we will use it only in exceptional cases.' Ha! ... I read that 100 cases under this [injunctive relief] provision are in the court, compared with 10 or 12 under the regular [damages provisions]." He summarized, "if we interpret it your way, we say your fears, business community, were absolutely right. ... Before you know the thing is wrong, they hit you with bad damages."

Justice Samuel Alito then delivered a gut punch. Reading a statement from David Fitzgerald, who served as a litigation attorney for the FTC in the 1970's and 1980's, he related that the FTC "decided that [the limitations in] Section 19 [made it] too time consuming so it ... looked for a workaround and [found one]." Indeed, Fitzgerald explained (through Justice Alito's reading) that the FTC's counsel "thought these arguments were not going to succeed but, to their surprise, they were successful." Justice Alito noted that these statements are "pretty damaging to [the FTC's] position."

Other justices expressed similar concern. Justice Clarence Thomas, who followed the Chief Justice in order, added that Section 13(b)(1) "seems to suggest that [it] is focused on forward-looking, preventing a future or a present action. It seems that what you're doing here is using it for something that has already happened." Justice Elena Kagan pressed the preliminary warning "protections" in Sections 5 and 19 for damages claims, which she contrasted with the unfettered authority the FTC claimed under Section 13. She stated:

[I]t seems to me that the best argument against your position, and it's a strong one, comes from Section 5 and Section 19, which have these protections in them that Section 13 does not, that there has to be a repeated violation, that there has to be a certain kind of *mens rea* and so forth. And it does seem as though your interpretation of Section 13 makes those pretty much entirely irrelevant.

Likewise, Justice Neil Gorsuch remarked that "[t]he FTC was set up in part to enact rules about deceptive conduct" that would have given businesses advance notice of conduct subject to sanction. However, Justice Gorsuch explained:

[The FTC] chose not to go that route, preferred an enforcement route. ... I think our core concern is you're rendering those protections superfluous, that there's very little incentive for the agency to ever comply with them, and it's just another step away from what Congress anticipated would be a regulatory regime that's never materialized.

Justice Brett Kavanaugh then offered an excuse for the FTC, while delivering a *coup de grace*. He stated:

I worked in the Executive Branch for many years so I understand how this happens. When you're in the Executive Branch or an independent agency, you want to do good things and prevent or punish bad things, and sometimes your statutory authority is borderline. And it could be war policy or immigration or environmental or what have you, but with good intentions the agency pushes the envelope and stretches the statutory language to do the good or prevent the bad.

The concerns about "fair warning" notions that today's justices expressed in the *AMG* argument echo those that Justice Holmes memorialized ninety years ago. Remedies should not be implied, and fair warning may be required. While the FTC Act is at issue in *AMG*, the opinion could impact other federal enforcement mechanisms relying on interpretations of "injunctive relief." Moreover, laudable governmental goals cannot justify the procedural means. Respecting rather than circumventing fair warning obligations within regulatory and other statutory enforcement schemes is not only consistent with proper statutory construction and due process, it also fair. The Court's decision in *AMG* will illuminate these issues and perhaps serve as a broad protector of due process. A decision is expected before the term ends in June.

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